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No. 87-711

In The
Supreme Court of the United States
October Term, 1987

In re:

ROXANNE MANKIN, FDBA
THE ROXANNE MANKIN CO, INC.,

Debtor.

G. B. MUNN, aka BRUCE MUNN,

Petitioner,

vs.

CHARLES DUCK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT:

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS 1

A. When Congress Creates a Substantive Right, It Has a Large Degree of Discretion to Prescribe the Manner In Which That Right Is to Be Adjudicated 3

B. The Bankruptcy Amendments And Federal Judgeship Act Provides That the District Courts Will Retain the Essential Attributes of Judicial Power 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Glidden v. Zdanok, 370 U.S. 530, 534, 82 S.Ct. 1459, 8 L.Ed. 2d 671 (1962) 7

In re Consorto Construction Co., 212 F.2d 676, 678 (3d Cir. 1954) 6

In re Mankin, 823 F.2d 1296, 1300-01, 1309 (9th Cir. 1987) 2, 6

In re Wright Industries, Inc., 93 F.Supp. 58, 62 (N.D. Ohio 1950) 5

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed. 2d 598 (1982) ..... *passim*

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 105 S.Ct. 3325, 87 L.Ed. 2d 409 (1985) 2, 4, 7

UNITED STATES CONSTITUTION

Article III 3, 4, 8

Article I, Sec. 8, Cl. 4 4

STATUTES

11 U.S.C. Sec. 544 ..... 1, 2, 5

11 U.S.C. Sec. 545 5

11 U.S.C. Sec. 547 5

11 U.S.C. Sec. 548 5

11 U.S.C. Sec. 549 5

11 U.S.C. Sec. 701 4

11 U.S.C. Sec. 704 4

TABLE OF AUTHORITIES—Continued

Page

28 U.S.C. Sec. 152 7

28 U.S.C. Sec. 158 7

28 U.S.C. Sec. 1334 7

COMMENTARY

Collier On Bankruptcy, para. 70.49 at p. 596 (14th ed.) 6

Collier On Bankruptcy para. 544.02 at pp. 544-45 (15 ed.) 6

SUMMARY OF ARGUMENT

Congress did not violate Article III of the United States Constitution when it provided bankruptcy courts with jurisdiction to decide fraudulent conveyance actions under 11 U.S.C. Sec. 544(b). Because Congress created the substantive right embodied by Sec. 544(b) it retained a large degree of discretion to determine the manner in which that right is to be adjudicated. That discretion includes the assignment of adjudicatory functions to the bankruptcy courts. In the present case the adjudicatory scheme selected by Congress does not violate the separation of powers doctrine because the bankruptcy courts are adjuncts of the district courts and thereby insulated from the other two branches of government.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

In the case before this Court the Ninth Circuit Court of Appeals decided two issues: first, that a bankruptcy trustee's action to set aside a fraudulent conveyance pursuant to 11 U.S.C. Section 544(b) is a "core proceeding" under the Bankruptcy Amendments And Federal Judgeship Act of 1984 (BAFJA); and, second, that bankruptcy court jurisdiction over a Section 544(b) action is constitutional.

Petitioner has not challenged the first holding. The Ninth Circuit correctly interpreted BAFJA to grant jurisdiction to the bankruptcy courts as broad as possible under the Constitution. Accordingly, the Ninth Circuit refused to draw a distinction between fraudulent conveyance actions brought under Bankruptcy Code Section 548 and those under Section 544(b) where no such distinction had been made by Congress. *In re Mankin,* 823 F.2d 1296, 1300-1301 (9th Cir. 1987).

The second holding raises more complex Constitutional questions. However, the issues raised by petitioner were treated in great detail by the Ninth Circuit and the result is consistent with the prior decisions of this Court and the Constitutional principles underlying those decisions.

The precedent used most often as a guide to the problems of bankruptcy court jurisdiction is *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed. 2d 598 (1982). Unfortunately, there was no majority decision in that case and therefore it stands only for the narrow proposition that bankruptcy courts lack jurisdiction to render final judgment in state law contract actions between private parties without the consent of the litigants. *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 584, 105 S.Ct. 3325, 87 L.Ed. 2d 409 (1985); see also *Northern Pipeline,* supra, 102 S.Ct. at 2882 (dissent of Chief Justice Burger) (only a very narrow category of claims fall outside bankruptcy court jurisdiction).

The Ninth Circuit interpreted the *Northern Pipeline* plurality opinion to allow non-Article III courts to ex-

ercise jurisdiction in two types of cases: cases involving "public rights" and cases where the decisionmaker is serving as an adjunct to an Article III court.[1] There were three factors that led the Ninth Circuit to conclude that the Constitution had not been violated in the present case. First, the court noted that when Congress creates a substantive right it retains a large degree of discretion to dictate the manner in which that right is to be adjudicated. Second, the court held that the changes brought about by BAFJA whereby the executive branch no longer plays a role in bankruptcy judge appointments sufficiently insulated the bankruptcy courts to satisfy the principle of separation of powers. Finally, the court felt that it was important to realize that bankruptcy courts have historically exercised jurisdiction over those proceedings that lie at the core of the federal bankruptcy law. The Ninth Circuit's decision was based not on whether the facts fell squarely within one of this Court's prior decisions, for example any of the "public rights" decisions, but, rather, whether the decision was supported by the separation of powers doctrine as enunciated by this Court.

A. When Congress Creates a Substantive Right, It Has a Large Degree of Discretion to Prescribe the Manner In Which That Right Is to Be Adjudicated.

One of the principles important to the issue of bankruptcy court jurisdiction is the principle that "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that

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[1] The *Northern Pipeline* plurality also recognizes non-Article III jurisdiction for "territorial courts" and "courts martial". 102 S.Ct. at 2868-69.

right may be adjudicated—including the assignment to an adjunct of some functions historically performed by [Article III] judges". *Northern Pipeline,* supra, 102 S.Ct. at 2876 (plurality opinion). That principle was recently upheld by this Court in *Thomas v. Union Carbide Agricultural Products Co.,* supra. In *Thomas* this Court was faced with deciding the constitutionality of a binding arbitration procedure under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The Court held that the arbitration provision did not violate Article III of the United States Constitution and stated:

> Our holding is limited to the proposition that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.
>
> *Thomas,* supra, 87 L.Ed. 2d at 428.

A brief overview of the role played by a Chapter 7 trustee shows that the right at issue in the present proceedings is such a quasi-public right created by Congressional enactment of the Federal Bankruptcy Code pursuant to Article I, Section 8, Cl. 4 of the United States Constitution. and therefore does not require resolution by an Article III court.

A Chapter 7 bankruptcy trustee is a creature of federal law who is appointed promptly upon the commencement of a Chapter 7 case. 11 U.S.C. Sec. 701. Among the mandatory duties of the trustee is the duty to "collect and reduce to money the property of the estate". 11 U.S.C. Section 704. Collecting those assets which rightfully belong to the estate is not always a simple task. To aid the bankruptcy trustee in his efforts to collect estate assets

the Bankruptcy Code arms him with numerous rights and powers. Among these are: the rights and powers of a lien creditor and as a successor to certain creditors and purchasers, 11 U.S.C. Sec. 544; the power to avoid certain statutory liens, 11 U.S.C. Sec. 545; the power to recover preferential transfers, 11 U.S.C. Sec. 547; the power to recover fraudulent transfers, 11 U.S.C. Secs. 548, 544; and the power to avoid certain post-bankruptcy transfers, 11 U.S.C. sec. 549. By wielding these various rights and powers the Chapter 7 bankruptcy trustee seeks to accomplish the goals of the federal bankruptcy law by rounding up estate assets for an equitable distribution to creditors. This function of the Chapter 7 trustee lies at the "core" of our federal bankruptcy system and is essential to the smooth and speedy administration of Chapter 7 bankruptcy cases.

Petitioner repeatedly argues that this case is no different from *Northern Pipeline* because the trustee is utilizing state law in order to "bring property into the bankruptcy estate."[2] That argument glosses over the fundamental differences between a Chapter 11 debtor-in-possession (*Northern Pipeline*) and the Chapter 7 bankruptcy trustee. It also ignores the historical role of bankruptcy trustees in liquidation cases and the importance of his ability to recover illegitimately transferred assets. When Congress gave these "strong arm" powers to the bankruptcy trustee, it was incorporating state law into federal bankruptcy law. *In re Wright Industries, Inc.*, 93 F.Supp.

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[2] At its most basic level the role of the bankruptcy trustee is to "bring property into the estate" for distribution to creditors. The fact that a trustee seeks to "bring property into the estate" should have no bearing on the Constitutional issues before this Court in the present case.

58, 62 (N.D. Ohio 1950); see also, *In re Consorto Construction Co.*, 212 F.2d 676, 678 (3d Cir. 1954) (trustee's strong arm powers are rights created by the Bankruptcy Act itself); see generally, *Collier On Bankruptcy*, para. 70.49 at p. 596 (14th ed.) (Bankruptcy Act). The leading commentator on the Bankruptcy Code instructs us that this aspect of the law has not been changed by the adoption of the Bankruptcy Reform Act of 1978. *Collier On Bankruptcy*, para. 544.02 at pp. 544-45 (15th ed.). To the extent the Chapter 7 trustee proceeds under Sec. 544(b) to recover fraudulently conveyed assets in order to provide an equitable distribution to creditors, he acts at the direction of Congress in the pursuit of federal goals. Because Congress has utilized state law to achieve federal goals, Congress retains a large degree of discretion to prescribe the manner in which the specific right is to be adjudicated. See *In re Mankin*, supra, at 1309.

B. The Bankruptcy Amendments And Federal Judgeship Act Provides That the District Courts Will Retain the Essential Attributes of Judicial Power.

A second principle important to the issue of bankruptcy court jurisdiction is the principle that there must be limitations imposed on the non-Article III decisionmaker so that " 'the essential attributes' of judicial power are retained in the Art. III court". *Northern Pipeline*, supra, 102 S.Ct. at 2876 (plurality opinion). If this were not the case the adjudicatory scheme would run the risk of violating the separation of powers doctrine.

At the time this Court decided *Northern Pipeline* bankruptcy judges were appointed by the executive branch. Congress changed this with the 1984 enactment of BAFJA.

Bankruptcy judges are now appointed by the judges of the United States courts of appeals and serve as judicial officers of the district courts. 28 U.S.C. Sec. 152(a)(1). Original and exclusive jurisdiction over bankruptcy cases and proceedings lies with the district courts. 28 U.S.C. Sec. 1334(a). The parties have a right to appeal any decisions of the bankruptcy court to the district court. 28 U.S.C. Sec. 158.

BAFJA's movement of the bankruptcy courts back under the wing of the district courts alleviated an important constitutional criticism of the 1978 Bankruptcy Reform Act. See *Northern Pipeline,* supra, 102 S. Ct. at 2876, n. 31. The bankruptcy courts no longer stand alone, independent of the district courts. Accordingly, there is no longer a threat that the principle of separation of powers will be breached by one of the other two branches of government.

CONCLUSION

The subject before this Court involves "one of the most confusing and controversial areas of constitutional law". *Northern Pipeline,* supra, 102 S.Ct. at 2883 (Dissent of Justice White), citing *Glidden Co. v. Zdanok,* 370 U.S. 530, 534, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962) (plurality opinion). Perhaps the best approach to this problem was set forth in the *Thomas* case: "that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III". *Thomas, supra,* 87 L.Ed. 2d at 424. The approach taken

by the Ninth Circuit in this case did just that, and resulted in a decision well within Constitutional bounds.

Congress did not violate Article III of the United States Constitution when it provided bankruptcy courts with jurisdiction to decide fraudulent conveyance actions under 11 U.S.C. Sec. 544(b). Because Congress created the substantive right at issue here, it retained a large degree of discretion to determine the manner in which that right is to be adjudicated. That discretion includes the assignment of adjudicatory functions to the bankruptcy courts. In the present case the adjudicatory scheme selected by Congress does not violate the separation of powers doctrine because the bankruptcy courts are adjuncts of the district courts and thereby insulated from the other two branches of government.

The decision rendered by the Ninth Circuit Court of Appeals in this case is consistent with this Court's prior decisions and does not violate Article III of the Constitution. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted this 17 day of November, 1987.

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